UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

BRIAN BOWEN II, PLAINTIFF, v. ADIDAS AMERICA, INC.; JAMES GATTO; MERL CODE; CHRISTIAN DAWKINS; MUNISH SOOD; THOMAS GASSNOLA; and CHRISTOPHER RIVERS, DEFENDANTS.	NO. 3:18-CV-3118-JFA

ADIDAS'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED COMPLAINT

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Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant adidas America Inc. ("adidas") moves this Court to dismiss the above-captioned Amended Complaint by Plaintiff Brian Bowen II with prejudice for failure to state a claim upon which relief can be granted.

PRELIMINARY STATEMENT

Bowen's second attempt to plead civil RICO claims does not cure the shortcomings of the first complaint (the "Original Complaint"), and should be dismissed. In its Order granting in part defendants' motions to dismiss the Original Complaint, this Court found the Original Complaint's allegations of the predicate acts of sports bribery and wire fraud insufficient. (*See* Order at *4–5, *8, Aug. 8, 2019, ECF No. 82.) The Court dismissed the sports bribery predicate with prejudice but granted Bowen leave to amend his wire fraud allegations to try to meet the heightened pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure. (*Id.*) As this Court explained, to satisfy Rule 9(b), allegations of fraud must state with particularity the circumstances constituting the fraud—at a minimum, the "who, what, when, where, and how"—and Bowen's conclusory allegations of sham invoices and false certifications fell short. (*See id.* at *5–7.)

Bowen's amended complaint (the "Amended Complaint") makes numerous superficial and incremental additions, but it fails to address the material deficiencies that this Court identified. For instance, although Bowen has now attached copies of the invoices he claims were shams, the related allegations have not been substantively changed from those that the Order found to be insufficient. (*See id.* at *6.) Similarly, the Amended Complaint still relies on a general allegation that defendants "knowingly made, intended to make, and caused and intended to cause others to make misrepresentations and material omissions" in connection with purportedly false certifications of Bowen's eligibility. (Am. Compl. ¶ 229.) As the Order noted,

this is exactly the type of simple allegation that "Rule 9(b) was designed to deter," and the pleadings continue to lack any supporting allegations of defendants' involvement in false certifications, including "the specific time or place that Defendants allegedly made or caused others to make false certifications regarding Plaintiff's eligibility." (Order at *7.)

The Amended Complaint therefore fails to adequately allege wire fraud against any defendant, and because wire fraud is the only unlawful act that Bowen has alleged to support the predicate act of money laundering, that predicate act too must be dismissed. Hence, the Amended Complaint fails to adequately allege any predicate acts, and Bowen's civil RICO claims must be dismissed in their entirety.

The failure to satisfy Rule 9(b) is particularly plain as to adidas. Bowen has failed to plead facts suggesting any direct corporate liability: the Amended Complaint is devoid of specific allegations that anyone in adidas's upper management knew, condoned, or was in any way involved in the payments to players' families. Nor does the Amended Complaint state a basis for adidas to be held vicariously liable. New allegations in the Amended Complaint confirm that adidas was itself deceived by the alleged scheme. It is thus apparent on the face of the pleadings that none of the purported predicate acts were carried out by adidas employees or agents acting under their scope of authority, and adidas cannot be vicariously liable.

Even if Bowen had remedied his wire fraud allegations, which he has not, he still lacks standing to bring civil RICO claims because he has not pleaded the requisite concrete injury to business or property directly caused by the alleged racketeering activity. The Court's Order denied Defendants' motion to dismiss as to Bowen's lack of standing under civil RICO "due to the leave granted to [Bowen] to amend his pleading" and thus left open the question of whether Bowen has pleaded RICO standing. (*Id.* at *8 n.2.) Bowen has not and cannot plead RICO

standing, and his lack of standing likewise requires dismissal of the Amended Complaint with prejudice.

In sum, adidas is not the proper party from whom Brian Bowen may recover for his injuries, and RICO is not the proper means.

BACKGROUND

I. Allegations in the Amended Complaint

A. The Parties

As alleged, Plaintiff Bowen is a South Carolina resident and former All-American high school basketball player. (Am. Compl. ¶ 14, Aug. 23, 2019, ECF No. 84.)

Defendant adidas is an athletic apparel company headquartered in Oregon that directs U.S.-based operations on behalf of adidas A.G., a German joint stock corporation that is not a party to this action. (*Id.* ¶ 15.)

Four Defendants are or were adidas employees or agents: Defendant James Gatto is an Oregon resident and was during all relevant times adidas's Director of Global Sports Marketing-Basketball, where he oversaw adidas's high school and college basketball programs. (*Id.* ¶ 16.) Defendant Merl Code is a South Carolina resident who at all relevant times was a consultant to adidas and was affiliated with various high school and college basketball programs sponsored by adidas. (*Id.* ¶ 17.) Defendant Christopher Rivers is an Oregon resident and "has been employed by Adidas America since 2009 as Senior Player Relations Manager for Adidas's basketball division." (*Id.* ¶ 21.) Defendant Thomas Joseph "T.J." Gassnola is a Massachusetts resident and was a "paid outside consultant" to adidas, reporting to Gatto. (*Id.* ¶ 20.)

Two Defendants are non-adidas consultants and advisors: Christian Dawkins is a Michigan resident, an "athlete advisor," and was the "team director of the Adidas-sponsored AAU basketball team known as Dorian's Pride," on which Bowen played in his "middle school

years." (*Id.* ¶ 18.) Defendant Munish Sood is a New Jersey resident and the "founder and chief investment officer" of Princeton Advisory Group, which is an "investment management" firm that purportedly helped "funnel . . . bribe payments" and "facilitate[d] the use sham invoices to disguise those bribe payments." (*Id.* ¶ 19.)

B. Factual Allegations

Bowen alleges that the Individual Defendants aimed to boost adidas's market share by bribing parents of prospective student-athletes to play basketball at universities that adidas sponsored. (*Id.* ¶¶ 37–38, 108.) By showcasing the adidas brand and enhancing its popularity, the Defendants allegedly sought to manipulate consumer preferences and generate additional sales that would not have materialized without the underlying criminal acts. (*Id.* ¶¶ 104, 238.) Bowen asserts that this scheme constituted an "enterprise" of the Individual Defendants along with NCAA coaches at adidas-sponsored universities and individual directors of high school amateur athletics union ("AAU") teams sponsored by adidas. (*Id.* ¶ 103.)

Bowen alleges that his father agreed to accept a payment of $100,000, and did in fact receive $19,400 in July 2017 from Sood, on the pretext of securing Bowen's commitment to attend the University of Louisville ("UofL"). (*Id.* ¶¶ 202, 213–14.) Bowen disclaims all personal knowledge of the payment and states that his decision to attend UofL was the result of a campus visit and conversations with coaches and athletics staff. (*Id.* ¶¶ 183–88.) Bowen claims that similar payments were made to the families of other student-athletes who attended North Carolina State University and the University of Kansas. (*Id.* ¶¶ 143–64.) Bowen further alleges that NCAA rules prohibit student-athletes from receiving benefits, including money, directly or indirectly, from a financial advisor or an agent, and that student-athletes recruited in violation of NCAA rules "are at risk of being declared ineligible to participate in athletics." (*Id.* ¶ 31.)

The payment Bowen's father accepted in July 2017 came to light on September 26, 2017, when the U.S. District Court for the Southern District of New York unsealed a criminal complaint making public the alleged scheme. Gatto, Code, Dawkins, and Sood were all arrested and charged with various felonies, including wire fraud and money laundering, on September 25, 2017. (*Id.* ¶¶ 16–19 (citing *United States v. James Gatto*, No. 17-CR-686 (S.D.N.Y.).) On March 30, 2018, Gassnola was arrested and charged with one count of conspiracy to commit wire fraud. (*Id.* ¶ 20 (citing *United States v. Thomas Gassnola*, No. 18-CR-252 (S.D.N.Y.).) On August 27, 2018, Sood pleaded guilty to several of his charges. (*Id.* ¶ 19.) Rivers is not alleged to have been charged. (*See id.* ¶ 21.)

After becoming aware of Bowen's father's alleged receipt of the payment, UofL chose to hold Bowen out of NCAA competition. (*See id.* ¶ 232.) On November 22, 2017, UofL's men's basketball team "announced publicly via Twitter that 'Brian Bowen will not play at the University of Louisville.'" (*Id.* ¶¶ 282, 299 (quoting but not citing @LouisvilleMBB, *Twitter* (Nov. 22, 2017, 9:44 AM), https://twitter.com/LouisvilleMBB/status/933360462649012225); *see also* Decl. of William H. Taft V In Supp. of Def. adidas's Mot. to Dismiss Am. Compl. ("Taft Decl."), Attach. 1 (supplying a copy of the Tweet).) UofL's Tweet also stated that Bowen could "remain on scholarship":

> Brian Bowen will not play at the University of Louisville. ***He may remain on scholarship*** but will not be allowed to practice or compete[.]… The University of Louisville has informed men's basketball student-athlete Brian Bowen that it will provide him written permission, per NCAA Bylaw 13.1.1.3, to contact another collegiate institutions [sic] if he wishes to transfer. If he remains at the institution, ***he can continue to receive his athletics scholarship*** but will not be allowed to practice or compete for the institution's men's basketball team at any point in the future.

(@LouisvilleMBB, *Twitter* (Nov. 22, 2017, 9:44 AM) (emphasis added).)

Bowen did not continue as a student of UofL. He relocated to South Carolina in an unsuccessful attempt to join another NCAA men's basketball team following UofL's decision and then played basketball professionally in Sydney, Australia. (Am. Compl. ¶ 299.)

II. Procedural Background

A. The Original Complaint

Bowen's original complaint alleged four counts: two counts of substantive RICO violations, and two counts of conspiracy to commit RICO violations. (Compl. ¶¶ 228–51, Nov. 28, 2018, ECF No. 1.)

The first two counts named all Defendants and alleged they engaged or conspired to engage in racketeering activity under § 1962(c) of the RICO statute, which prohibits persons "employed by or associated with" an enterprise engaged in interstate commerce from participating in the enterprise's affairs "through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Specifically, Count I alleged Defendants violated § 1962(c) by actually engaging in such racketeering activity, and Count II alleged they conspired to do so, which is a violation of § 1962(d). (Compl. ¶¶ 218–227 (Count I, alleging violation of § 1962(c)); *id.* ¶¶ 228–35 (Count II, alleging violation of § 1962(d)).)

The other two counts—Counts III and IV—named only adidas and alleged that adidas violated or conspired to violate § 1962(a) of the RICO statute, which prohibits a person who has received income derived from a pattern of racketeering from investing it in an enterprise engaged in interstate commerce. (*Id.* ¶¶ 236–44 (Count III, alleging violation of § 1962(a)); *id.* ¶¶ 245–51 (Count IV, alleging violation of § 1962(d)).)

The presence of a "pattern" of racketeering activity—that is, two or more acts of racketeering activity—was an element in all four counts, and so in an attempt to meet that element, Bowen alleged Defendants had engaged in three predicate acts: (i) Wire Fraud:

Defendants' scheme allegedly included misrepresentations made over wires to universities, to conceal Bowen's non-compliance with NCAA rules in interference with the universities' abilities to appropriately allocate athletic scholarships, and to also Bowen, to conceal his father's decision to accept payments. (*Id.* ¶¶ 120, 159.) (ii) Sports Bribery: Defendants' scheme allegedly included acts of bribery intended to influence the outcome of NCAA games in violation of the federal sports bribery statute, 18 U.S.C. § 224. (*Id.* ¶ 225.) And (iii) Money Laundering: Defendants' scheme supposedly included the funneling of payments to Bowen's father and families of other athletes. (*Id.* ¶ 226.)

The Complaint alleged Bowen suffered numerous injuries, including the lost opportunity to play basketball at UofL and enter the NBA draft as a first or second round draft pick. (*Id.* ¶ 227.)

B. Motions to Dismiss the Original Complaint

After Defendants moved to dismiss the Original Complaint, the Court issued an Order granting in part and denying in part Defendants' motions. (Order at *8–9.) The Court held that two of Bowen's three categories of alleged predicate acts were insufficient to constitute racketeering activity. The Court concluded in its Order that the sports-bribery allegation was insufficient because the scheme's alleged purpose was to increase adidas's profits, not to influence the outcomes of NCAA games, as is necessary to meet the federal bribery statute. (*Id.* at *4.) And the wire-fraud allegations were insufficient because they failed to include the "who, what, when, where, and how" of the allegedly fraudulent acts, as required by Rule 9(b). (*Id.* at *7.) The Court did not rule on the sufficiency of the money laundering allegations or Defendants' argument that Bowen lacked standing to sue under civil RICO because he had not pleaded a concrete business or property injury directly caused by the alleged predicate acts. (*See*

id. at *8 n.2.) The Court granted Bowen leave to replead his allegations as to wire fraud, but not sports bribery. (*Id.* at *8–9.)

C. The Amended Complaint

Bowen filed an amended complaint on August 23, 2019. (*See* Am. Compl.) The Amended Complaint acts on the Court's authorization to replead the allegations as to wire fraud, and does so by supplementing the previous allegations from the Original Complaint with incremental and additional text. (*See generally* Taft Decl., Attach. 2 (Redline of Amended Complaint Compared to Original Complaint).)

STANDARD OF REVIEW

To survive a Rule 12(b)(6) motion a plaintiff must plead facts sufficient "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although a court must accept well-pleaded allegations as true in considering a motion to dismiss, it is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 555. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where a complaint contains allegations of fraud, the standard for stating a claim is heightened: "a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b).

Courts have "expressed skepticism toward civil RICO claims" and cautioned that "'particular care is required' when evaluating a RICO claim at the Rule 12 stage." *Bendfeldt v. Window World, Inc.*, No. 17-CV-39, 2017 WL 4274191, at *6 (W.D.N.C. Sept. 26, 2017) (first quoting *Sky Med. Supply Inc. v. SCS Support Claims Servs., Inc.*, 17 F. Supp. 3d 207, 220–21 (E.D.N.Y. 2014); then quoting *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991)) (noting that "[p]laintiffs wielding RICO almost always miss the mark").

ARGUMENT

Bowen's amended complaint fails to state a claim and should be dismissed in its entirety, with prejudice, because (I) Bowen again fails to allege two or more predicate acts of racketeering activity—the new fraud allegations still do not meet Rule 9(b)'s heightened standard, and without well-pleaded allegations of wire fraud, the money laundering predicate falls, too; (II) the RICO claims fail in particular against adidas, as the Amended Complaint's failure to satisfy Rule 9(b) is especially deficient with respect to any allegations of adidas's direct involvement, and vicarious liability is not available for the acts of rogue employees or agents who deceived adidas; and (III) Bowen lacks RICO standing because he does not plead a concrete harm to property or business directly caused by the alleged predicate acts.[1]

I. The new fraud allegations do not cure the Rule 9(b) deficiencies identified in the Court's August 8, 2019 Order, and Bowen thus fails to allege two or more instances of racketeering activity.

Under the RICO statute, subsections (a) and (c) of § 1962—the two subsections undergirding all of Bowen's RICO claims—require a plaintiff to plead a "pattern" of racketeering activity, which in turn requires "at least two acts of racketeering activity." 18 U.S.C. §§ 1961(5), 1962(a), (c). Here, the Amended Complaint alleges two kinds of racketeering activity, wire fraud and money laundering, neither of which is adequately pleaded.

A. The new wire-fraud allegations do not cure the deficiencies in the Original Complaint.

As this Court explained, to plead wire fraud, a plaintiff must plausibly allege "(1) the existence of a scheme to defraud and (2) the use of a wire communication in furtherance of the

[1] Other arguments raised in adidas's motion to dismiss the original complaint and not raised herein are excluded on the understanding that the Court's Order left open only the issues of the sufficiency of the pleadings of the predicate acts and plaintiff's standing to bring the alleged RICO claims. To be sure, adidas expressly preserves those arguments raised in the first motion to dismiss.

scheme." (Order at *5 (alterations omitted) (quoting *United States v. Jefferson*, 674 F.3d 332, 366 (4th Cir. 2012)). Wire fraud must be pleaded with particularity pursuant to Federal Rule of Civil Procedure 9(b), and thus "the complaint must describe the time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." (*Id.* (quoting *United States v. Berkeley Heartlab, Inc.*, 247 F. Supp. 3d 724, 729 (D.S.C. 2017))); *see also* Fed. R. Civ. P. 9(b) (a party "alleging fraud" must "state with particularity the circumstances constituting fraud").

The Court held that the wire-fraud allegations in the Original Complaint were insufficient because they did not provide the specificity required by Rule 9(b), including the "who, what, when, where, and how" of the allegedly fraudulent acts. (Order at *7.) The Court reviewed three groups of wire-fraud allegations in the Complaint and identified their Rule 9(b) deficiencies.

First, the Court noted that Bowen's allegations of purported sham invoices were pleaded on information and belief and lacked supporting allegations. Bowen has added superficial details, including attaching as exhibits the invoices, but fails still to remedy the deficiency identified by the Court. Some of the allegations cited in the Order remain on information and belief. (*See* Order at *6; *compare* Compl. ¶ 161, *with* Am. Compl. ¶ 202.) And whereas the Order noted that Bowen's "list of alleged sham invoices" lacked key specifics, such as "when the invoices were allegedly approved, where the invoices were approved, and which invoices were allegedly approved by which people," those allegations remain substantively unchanged in the Amended Complaint. (*See* Order at *6; *compare* Compl. ¶¶ 204–06, *with* Am. Compl. ¶¶ 260–62.)

Second, the Court found that Bowen's allegation that Defendant Rivers approved a bribe payment of $25,000 to Dennis Smith, Jr. lacked sufficient supporting allegations. (*See* Order at *7.) The Amended Complaint now attempts to remedy that failing by alleging that because Smith, Jr. was contemplating "'go[ing] from an Adidas team to a Nike team,'. . . . "Rivers and Smith's father had a private conversation after which Rivers reported that 'he had taken care of it, that the kid was going to stay with an Adidas program, Team Loaded, and that he would play the following year with us.'" (Am. Compl. ¶ 144.) This new text does nothing to cure the original problem, because the alleged "private conversation" does not on its face suggest intentional misrepresentation.[2]

Third, the Court held that the general allegation that defendants "knowingly made, intended to make, or caused or intended to cause others to make false certifications" to UofL and the NCAA regarding the bribe to Bowen's father was insufficient under Rule 9(b) because it failed to identify, "among other things, the specific time or place that Defendants allegedly made or caused others to make false certifications regarding Plaintiff's eligibility." (Order at *7 (quoting Compl. ¶ 177 and explaining that "[t]he simple allegation that Defendants made a false

[2] In another unsuccessful attempt to bolster his wire-fraud allegations, Bowen alleges that Gassnola contracted with adidas to offer it "a fiduciary duty of loyalty," and this somehow constituted fraud. Specifically, the allegation states that on February 15, 2015, adidas and Gassnola entered into an agreement where adidas would make $60,000 and $65,000 payments to Gassnola in 2015 and 2016, in return for Gassnola offering adidas "a fiduciary duty of loyalty." (Am. Compl. ¶ 145.) The text of the actual alleged agreement, attached to Bowen's Amended Complaint as Exhibit 3, appears to be a form "Endorsement, Sponsorship and Supplier-AAU" agreement from adidas wherein Gassnola would serve as a consultant in return for adidas's sponsorship of his AAU team. (*Id.*, Ex. 3 at *1.) The "fiduciary duty" clause is a part of a paragraph that runs onto a previous page and has not been included in the exhibit, and the $60,000 and $65,000 amounts are Gassnola's "Travel Allotment[s]." (*Id.* at *12.) A related allegation says this agreement was renewed on January 1, 2017, with a $70,000 travel allotment. (*Id.* at ¶ 154(e).) There is nothing untoward about this boilerplate agreement, and the related allegation in the Amended Complaint is not pleaded with the requisite Rule 9(b) particularity.

certification to the University of Louisville regarding the existence of a bribe to Plaintiff's father is the type of allegation Rule 9(b) was designed to deter").) That deficiency remains. The Amended Complaint asserts the same general allegation that the defendants "knowingly made, intended to make, and caused and intended to cause others to make misrepresentations and material omissions in communications with Plaintiff and the University of Louisville personnel regarding the existence of the $100,000 bribe scheme." (Am. Compl. ¶ 229.) Lumping all defendants together, alleging that they all both made and caused others to make misrepresentations, and stating that they did so in undefined "communications with Plaintiff and the University of Louisville" fails under Rule 9(b) for exactly the reasons identified in the Order. Indeed, in the following paragraph, Bowen alleges that "these omissions of material fact occurred during each of Defendants' direct and indirect communications with Plaintiff," but the only specific "direct [or] indirect communication" referenced is purportedly "during Plaintiff's unofficial visit" to UofL. (*Id.* ¶ 230.) Yet the misinformation Bowen received at the visit regarding his eligibility is alleged to have come from "the athletic department" and unidentified "coaches and athletic department officials," which cannot pass muster under Rule 9(b). (*Id.* ¶ 188.) Indeed, the only defendant alleged to have even been present at Bowen's UofL visit was Dawkins, and all he allegedly said was that UofL "was a good basketball fit" for Bowen. (*Id.*)

B. Without viable fraud allegations, the money-laundering allegations similarly fail.

The second category of predicate act in the Amended Complaint is money laundering (*Id.* ¶¶ 235–72), but, like the wire-fraud allegations, the insufficient fraud allegations undermine those allegations.

Money laundering is "knowingly [engaging] in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity."

18 U.S.C. § 1957(a). '"Specified unlawful activity' is defined in § 1956(c)(7) and includes a number of different criminal activities" including mail and wire fraud. *Kimberlin v. Nat'l Bloggers Club*, No. 13-CV-3059, 2015 WL 1242763, at *8 (D. Md. Mar. 17, 2015).

Here, the only alleged "unlawful activity" is wire fraud and tax fraud (Am. Compl. ¶¶ 136, 140, 152, 235), but tax fraud is not a basis for money laundering, *see* 18 U.S.C. § 1956(c)(7) (listing the bases). The presence of a money laundering predicate act thus rises or falls with the wire-fraud allegations, which are, for the reasons discussed above, still insufficient. *See Kimberlin*, 2015 WL 1242763, at *8 (where the alleged "specified unlawful activity" was the "same wire fraud and mail fraud allegations upon which [Plaintiff] relie[d] to support his other independent predicate acts of mail and wire fraud," the court found that "[b]ecause the Court has already concluded that [Plaintiff] failed to adequately plead facts to support the predicate acts of wire fraud and mail fraud [], the predicate act of money laundering necessarily must fail, as it is based on the same set of facts and circumstances as were the mail and wire fraud predicate acts.").

In sum, the Amended Complaint does not sufficiently allege one, let alone two, predicate acts against any Defendant. Therefore the Amended Complaint does not meet the necessary "pattern of racketeering activity" for each of its four RICO claims.

II. The allegations against adidas are particularly deficient under Rule 9(b), and the Amended Complaint fails to state a claim for adidas's direct or vicarious liability.

The Amended Complaint's allegations against adidas are especially deficient under Rule 9(b) and thus fail to state a claim for adidas's direct involvement in the alleged RICO violations. Nor does the Amended Complaint allege facts on which adidas could be held vicariously liable for the acts of employees or agents.

To plead a corporation's direct liability in a civil RICO action, a plaintiff must meet the same test as for a natural person by showing that the corporation engaged in "conduct or participate[d], directly or indirectly, in the conduct of [the alleged] enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Direct corporate liability under RICO is a high bar. *See United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 876–78 (D.D.C. 2006) (finding direct corporate liability where corporations participated in numerous formal and informal business associations to suppress health information regarding tobacco, placing general counsels on a committee organizing the enterprise's actions, controlling the use of relevant corporate trademarks and communications, possessing a large volume of correspondence between members of the enterprise regarding the enterprise's affairs, and destroying and concealing many related records), *aff'd*, 566 F.3d 1095 (D.C. Cir. 2009).

The Amended Complaint has alleged nothing close to corporate involvement against adidas, especially under the lens of Rule 9(b). There are no particularized allegations that *anyone* in adidas's senior management—or, indeed, any adidas employee or agent outside the four named in this action—knew that the purported sham invoices were false or that certifications of Bowen's eligibility were inaccurate. None of the required "who, what, when, where, and how" allegations are pleaded as to any knowing misrepresentations by adidas.

As to the purported sham invoices, Bowen alleges only, on information and belief, that adidas had "intentionally loose oversight and lack of meaningful financial controls" and that its "executives purposefully maintained a large, discretionary budget for its basketball marketing group in order to facilitate payment of the sham invoices." (Am. Compl. ¶¶ 264–65.) These generic allegations are insufficient to support Rule 9(b)'s heightened standard because they do not reflect any fraudulent conduct towards any particular person or entity. *See BMS Nat. Res.,*

Inc. v. Martin Cty. Land Co. LLC, No. 10-CV-1261, 2011 WL 227646, at *3 (S.D.W. Va. Jan. 21, 2011) (finding mail and wire fraud allegations insufficient under Rule 9(b) because the allegations did "not identify the parties to whom the misrepresentations were directed" or "identify their contents or when they were made").

The same is true for the purported false certifications of Bowen's eligibility. The Amended Complaint says in shotgun fashion that all defendants "knowingly made, intended to make, and caused and intended to cause others to make misrepresentations and material omissions" in connection with purportedly false certifications of Bowen's eligibility. (Am. Compl. ¶ 229). That generic allegation is insufficient, and in particular with regard to adidas, there is nothing at all more specific. (*See id.* ¶¶ 229–32 (new allegations as to certifications, none mentioning misrepresentations by adidas)). In fact, the only specific instance of certification misrepresentation that Bowen does allege involves Dawkins, not adidas or any other defendant (*id.* ¶ 233), and Dawkins was not even an adidas employee or agent (*see id.* ¶ 18 (stating Dawkins ran an AAU team and was an "athlete advisor")).

Nor can Bowen remedy his failure to plead adidas's direct involvement by seeking to hold adidas vicariously liable. There is no basis to hold adidas vicariously liable for the unauthorized acts of its employees or agents, especially given that—per the Amended Complaint—adidas, too, was deceived by the purported scheme. In a civil RICO case, a corporation may only be held liable for the illegal acts of its employee or agent to the extent the employee or agent is "acting within the scope of his authority" in committing the illegal acts. *United States v. Najjar*, 300 F.3d 466, 484–85 (4th Cir. 2002) (quoting *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 162 (2001)) (permitting corporate liability where the president of the corporation knew of the illegal act of its employee and "did not seek to halt it").

Courts "generally do not impose vicarious liability under RICO unless the corporate . . . defendant is a central figure in the RICO scheme," and thus, "[p]laintiffs seeking to impose vicarious liability must, at a minimum, show that a corporate . . . officer had knowledge of or was recklessly indifferent toward the unlawful activity." *Bd. of Managers of Trump Tower at City Ctr. Condo. by Neiditch v. Palazzolo*, 346 F. Supp. 3d 432, 459 (S.D.N.Y. 2018) (quoting *Fairfield Fin. Mortg. Grp., Inc. v. Luca*, 925 F. Supp. 2d 344, 350 (E.D.N.Y. 2013)). Moreover, "courts consider other factors, such as the number of high-level employees involved in the racketeering activity, their degree of participation in the racketeering activity, whether these employees themselves committed the alleged predicate acts, and whether the corporation substantially benefited from the racketeering activity." *Id.* at 460 (quoting *Makowski v. United Bhd. of Carpenters & Joiners of Am.*, No. 08-CV-6150, 2010 WL 3026510, at *6 (S.D.N.Y. Aug. 2, 2010)). Thus, where high-level officers were aware of the offending activity, a RICO claim may exist against the corporation, but where high-level official knowledge is lacking, vicarious liability is often not available.[3]

[3] *Compare, e.g., United States v. Route 2, Box 472, 136 Acres More or Less*, 60 F.3d 1523, 1528 (11th Cir. 1995) (finding no corporate liability for an incorporated trout farm due to the president's marijuana-growing activity because there was "no evidence" that any other officers or directors "were aware" of the president's acts), *and United States v. One Parcel of Land Located at 7326 Highway 45 N., Three Lakes, Oneida Cty., Wis.*, 965 F.2d 311, 317 (7th Cir. 1992) (same, where it was not likely that the rest of the corporation would have been notified of the agent's drug activity), *with Najjar*, 300 F.3d at 483-85 (holding corporation liable where the president likely knew of the auto-theft-"chop shop" ring, based on his desk's proximity to the ring leader "in an office filled with stolen car parts," his presence during a discussion about the stripping of a particular vehicle, and a reference made to him in another conversation about backdating receipts), *and United States v. 141st St. Corp.*, 911 F.2d 870, 877 (2d Cir. 1990) (same, where corporation's president likely knew of agents' drug activity based on the corporate property being an "anthill" of drug use, police officers leaving three messages for the president regarding the drug activity, and a tenant having alerted the president about drug activity).

Here, as noted above, there is nothing to suggest any adidas officer, director, or anyone other than the four adidas employees and agents named as defendants in this action were aware of the alleged activity. This is not the kind of case implicating the corporation's general counsel, *cf. Philip Morris*, 449 F. Supp. at 1120–21, or its owners or managing officers, *cf. Fairfield*, 925 F. Supp. 2d at 350. And wire fraud and money laundering, of course, were not within the scope of the authority provided by adidas to any of its employees or agents. Nothing in the Amended Complaint suggests otherwise. For instance, the boilerplate contract that Gassnola signed, which is attached to the Amended Complaint, states that adidas may terminate the contract if Gassnola's team "fails to abide by the laws, statutes, regulations, or rules of any government." (Am. Compl., Ex. 11 at *10.) Moreover, far from "substantially benefit[ing]" adidas, *see Bd. of Managers of Trump Tower*, 346 F. Supp. 3d at 460, adidas was itself deceived by the individual defendants' efforts to process the purported sham invoices, according to numerous specific allegations in the Amended Complaint. (*See, e.g.*, Am. Compl. ¶¶ 209–10 (stating Code "falsely stated" to adidas's "marketing finance department" that his invoice was submitted on someone else's behalf who was supposedly, but not in actuality, not available to submit the invoice himself due to "limited access to a computer"); *see also id.* ¶ 147(f) (adding an allegation that Gassnola submitted an invoice to adidas requesting $30,000 to cover part of the bribe, that Gatto gave "his approval" in an email for adidas "to make payment," but not suggesting adidas knew the payment was for a bribe)); *id.* at ¶ 154(e), (i), (m) (same); *id.* ¶ 205 (same); *id.* ¶ 225–26 (same).))

The Amended Complaint fails to state a basis for direct or vicarious corporate liability against adidas, and adidas should therefore be dismissed, with prejudice, regardless of the adequacy of Bowen's allegations with respect to other defendants.

III. Bowen fails to plead a concrete injury to his business or property directly caused by the RICO violation and thus lacks RICO standing.

The RICO statute provides a civil cause of action only to one "injured in his business or property by reason of" a RICO violation. 18 U.S.C. § 1964(c). This requirement has been addressed by courts as a question of standing to bring a civil RICO claim. In its Order, this Court, "due to the leave granted to Plaintiff to amend his pleading," expressly reserved decision on whether Plaintiff's allegations satisfied RICO's strict standing requirements. (*See* Order at *8 n.2.) The allegations in the Amended Complaint do not meet the baseline requirements for RICO standing and should, for that separate reason, be dismissed with prejudice.

A civil RICO "plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex*, 473 U.S. 479, 496 (1985). It is well settled that, to adequately allege a "business or property" injury under civil RICO, the alleged injury must be to tangible property interests; a plaintiff's claimed lost opportunity or expectation, however likely to be realized, is insufficient as a matter of law. *See Taylor v. Bettis*, 976 F. Supp. 2d 721, 737 (E.D.N.C. 2013) (holding that "injury to mere expectancy interests or to an intangible property interest" is not sufficient to confer RICO standing), *aff'd* 693 F. App'x 190 (4th Cir. 2017) (affirming "for the reasons stated by the district court"); *Strates Shows, Inc. v. Amusements of Am., Inc.*, 379 F. Supp. 2d 817, 828 (E.D.N.C. 2005) ("[A]n expectancy interest, even if highly certain, is not a recognizable property interest."); *see also Gil Ramirez Grp., L.L.C. v. Hous. Indep. Sch. Dist.*, 786 F.3d 400, 409 (5th Cir. 2015) ("Injury to mere expectancy interests or to an intangible property interest is not sufficient to confer RICO standing."); *Ricker v. Edmisten*, No. 93-CV-1756, 1994 WL 32807, at *2 (4th Cir. 1994) (per curiam) (explaining that "unilateral expectations, however earnestly held," do not constitute a "property interest"). Meeting this

business-or-property injury requirement is necessary to stating a civil RICO claim; it is not merely a matter of damages. *See Strates Shows, Inc.*, 379 F. Supp. 2d at 825 ("a civil RICO complaint is vulnerable to a motion to dismiss if it fails to allege . . . an adequate injury to business or property").

Additionally, section 1964(c)'s "by reason of" language requires that a RICO plaintiff prove that the alleged RICO violation "not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 268 (1992). This dual-causation standard requires a "*direct* relation between the injury asserted and the injurious conduct alleged." *Slay's Restoration, LLC v. Wright Nat'l Flood Ins. Co.*, 884 F. 3d 489, 493 (4th Cir. 2018) (quoting *Holmes*, 503 U.S. 258, 268 (1992)). There must be "a proximity of statutory violation and injury such that the injury is sequentially the direct result—generally at 'the first step' in the chain of causation," and the injury cannot be "contingent on or derivative of harm suffered by a different party," regardless of foreseeability or motive. *Id.* at 494.

A court must thus analyze a plaintiff's standing to assert each claimed injury, dismissing any claims asserting injuries that are not to concrete business or property interests or not directly caused by the alleged predicate acts. *E.g.*, *Warnock v. State Farm Mut. Auto Ins. Co.*, No. 08-CV-1, 2008 WL 4594129, at *4–5 (S.D. Miss. Oct. 14, 2008); *Korman v. Trusthouse Forte PLC*, No. 89-CV-8734, 1990 WL 83353, at *5–6 (E.D. Pa. June 15, 1990).

In this case, the Original Complaint listed thirteen injuries, which the Amended Complaint did not modify. (*Compare* Compl. ¶ 227, *with* Am. Compl. ¶ 282.) None can be recovered under civil RICO.

A. Lost Opportunity to Play NCAA Basketball

Of the thirteen alleged injuries, five are different iterations of Bowen's harm in not being able to play NCAA basketball. (*See* Am. Compl. ¶ 282 (alleging damages due to "loss of

eligibility to play Division I basketball at the University of Louisville," "suspension from the University of Louisville men's basketball team," "forced removal from the University of Louisville men's basketball team," "loss of eligibility to play Division I basketball at any NCAA member institution," and "lost opportunity to enjoy the benefits and experience as a student-athlete at any NCAA member institution").) But Bowen had no property interest in playing NCAA basketball. All he had was an opportunity or expectation to do so, and "an expectancy interest, even if highly certain, is not a recognizable property interest." *Strates Shows, Inc.*, 379 F. Supp. 2d at 828. Courts have repeatedly held that aspiring athletes have no right to participate in college sports. *E.g.*, *Spath v. NCAA*, 728 F.2d 25, 29 (1st Cir. 1984) (collegiate hockey player's scholarship gave him no property right to play hockey); *Moffit v. Long*, No. 01-CV-1114, 2001 WL 37124656, at *2 (D.N.M. Dec. 19, 2001) (right to play college athletics not a property interest); *Hall v. NCAA*, 985 F. Supp. 782, 799 (N.D. Ill. 1997) (property rights do not include participation in college athletics); *Hawkins v. NCAA*, 652 F. Supp. 602, 611 (C.D. Ill. 1987) (basketball players barred from NCAA games were not deprived of a protected property interest).

Even if playing NCAA basketball were a property interest, Bowen has not and cannot plead that his lost eligibility was directly caused by the purported bribery scheme. The failure to plead direct causation between the alleged bribes and lost eligibility is demonstrated by the Amended Complaint's allegations regarding Dennis Smith, Jr. The Amended Complaint alleges that Smith, Jr. received money to play at North Carolina State University, played one season there without the school's knowledge of the payments, was drafted ninth overall the following year, and is now a successful NBA player. (*See* Am. Compl. ¶¶ 143–51.) That Smith, Jr. did not suffer the harms Bowen alleges, despite being an alleged victim of the exact same bribery

scheme, proves that it was the actions of others—such as UofL and the NCAA—upon learning of the bribes that directly caused Bowen's inability to play NCAA basketball, not the bribe itself.

B. Lost Scholarship at UofL

Bowen additionally alleges a "lost property interest in his Athletics Financial Aid Agreement for Student-Athletes with the University of Louisville." (*See id.* ¶ 282.) Had UofL denied Bowen his scholarship, it would constitute a lost property interest. But it did not, as the Twitter message from UofL that Bowen cites in his Amended Complaint makes clear. (*See* Taft Decl., Attach. 1 (Bowen "can continue to receive his athletics scholarship").)[4] Because Bowen voluntarily gave up his scholarship rather than had it revoked, he has alleged no injury to a property interest.

To the extent Bowen alleges that he was deprived of contractual "athletic-related benefits" (Am. Compl. ¶ 187), those do not constitute a lost property interest for the simple reason that Bowen had no contractual right to those benefits. Bowen's financial aid agreement with UofL promised him tuition, room, board, books, miscellaneous expenses, and nothing

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[4] The Court may reference the Louisville Basketball tweet as an exception to the general rule permitting review only of the complaint in a motion to dismiss, because the tweet is quoted and expressly cited in paragraphs 282 and 299 of the Amended Complaint. *See Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004) (reviewing a contract that was "explicitly referred to" in the complaint). The purpose of this exception, to prevent plaintiffs from cherry-picking statements from a document, is directly implicated in this case:

> What [this] rule seeks to prevent is the situation in which a plaintiff is able to maintain a claim of fraud by extracting an isolated statement from a document and placing it in the complaint, even though if the statement were examined in the full context of the document, it would be clear that the statement was not fraudulent.

Id. (*quoting In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)).

further. (Am. Compl., Ex. 6.) UofL had no contractual obligation to even keep Bowen on the team, let alone provide him with amorphous "athletic-related benefits."

Nor can Bowen plead that he lost his scholarship at UofL as a direct result of Defendants' alleged predicate acts. Even had the scholarship been withdrawn, which it was not, that would have been a decision made by UofL, not by any of the members of the alleged RICO enterprise.

C. Lost Future Earnings

Bowen further alleges that his inability to play NCAA basketball had an "associated impact on lifetime earnings" and resulted in a "loss of ability to develop basketball skills" and a "lost opportunity to enter the NBA draft as a first or second round draft pick after only one or two years of experience playing Division I basketball and associated impact on his lifetime career earnings." (Am. Compl. ¶ 282.) These harms, by their express terms, are expectancy interests and not recoverable under civil RICO. *See Strates Shows, Inc.*, 379 F. Supp. 2d at 828; *see also Castellanos v. Worldwide Distribution Sys. USA, LLC*, 290 F. Supp. 3d 692, 696–99 (E.D. Mich. 2017) (loss of expected salary not a tangible property interest recoverable under RICO); *Muigai v. IB Prop. Holdings, LLC*, No. 09-CV-1623, 2010 WL 5173313, at *5 (D. Md. Dec. 14, 2010) (plaintiff's alleged lost opportunity to earn money off property sale was insufficient, because plaintiff had only "a possible expectancy interest in the property"). Nor could it be maintained that Defendants' alleged bribe directly caused supposed lost future earnings, which are impacted more immediately by innumerable factors relating to Bowen's innate talent and development both before and after the alleged scheme. Even if it were assumed that the alleged scheme had some impact on Bowen's future career earnings, that indirect impact would not satisfy RICO's direct causation requirement. Consequently, Bowen cannot seek treble damages from the loss of potential future earnings.

D. Social and Financial Costs

Lastly, Bowen alleges various costs associated with attempting to play basketball at other schools and overseas. To the extent Bowen seeks undefined "social costs arising from his removal" from UofL's team (Am. Compl. ¶ 282), it is well-settled that emotional distress is insufficient to provide RICO standing, *see Evans v. City of Chicago*, 434 F. 3d 916, 926 (7th Cir. 2006) (collecting cases), *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965, 967 n.1 (7th Cir. 2013). Nor can Bowen recover the "attorney's fees and costs incurred in bringing this action" or "in connection with the federal government's investigation," the "costs incurred with applying for and trying out for other" schools," or the "costs incurred with obtaining alternative employment" in the Australian basketball league. (*See* Am. Compl. ¶ 282.) Bowen chose to incur these costs, and Defendants' alleged predicate acts were thus not their direct cause. *See, e.g.*, *Strates Shows, Inc.*, 379 F. Supp. 2d at 833 (legal fees and costs incurred to protest defendants' actions, "however justified," were not direct injuries, but at best indirect injuries which plaintiff chose to incur).

CONCLUSION

The Amended Complaint does not cure the Original Complaint's deficiencies as to wire-fraud and does not adequately meet RICO's standing requirement. The Amended Complaint should therefore be dismissed with prejudice. Additionally and alternatively, Bowen has failed to plead direct or vicarious liability against adidas, and adidas should be dismissed with prejudice from the case on that independent basis.

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Respectfully submitted,

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